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Supreme Court, U.S.
FILED

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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2005

CARL A. PRYEAR,

PETITIONER,

VS.

STATE OF ALABAMA,

RESPONDENT.

APPEAL FROM:

CIRCUIT COURT OF BALDWIN COUNTY
CASE NO.: CC 02-1349

COURT OF CRIMINAL APPEALS OF ALABAMA
CASE NO.: CR 03-0560

SUPREME COURT OF ALABAMA
CASE NO.: 1040406

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA

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QUESTIONS PRESENTED FOR REVIEW

I. WHETHER THE TRIAL JUDGE COMMITTED REVERSIBLE ERROR IN DENYING DEFENDANT'S MOTION TO DISMISSS FOR A LACK OF SUBJECT MATTER JURISDICTION IN THAT THE STATE FAILED TO PROVE DEFENDANT WAS REPRESENTED BY COUNSEL OR WAIVED HIS CONSTITUTIONAL RIGHT TO COUNSEL AS TO THREE PRIOR DUI CONVICTIONS THAT WERE REQUIRED FOR A FELONY DUI PROSECUTION?

II. WHETHER THE TRIAL JUDGE COMMITTED REVERSIBLE ERROR IN IMPROPERLY INSTRUCTING THE JURY AS TO WHAT QUALIFIED AS A PRIOR QUALIFYING DUI CONVICTION FOR FELONY PROSECUTION PURPOSES?

III. WHETHER THERE WAS INSUFFICIENT EVIDENCE TO SUPPORT THE GUILTY VERDICTS?

PARTIES

PETITIONER

CARL A. PRYEAR

RESPONDENT

STATE OF ALABAMA

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JURISDICTION

On March 11, 2005, the Supreme Court of Alabama entered its decision affirming the Alabama Court of Criminal Appeals' October 29, 2004 decision which denied Petitioner's Appeal to set aside his September 9, 2003 convictions and November 20, 2003 sentences. (Appendixes A, B and C). The jurisdiction of this Court is invoked under Title 28, United States Code, Section 1254 (1). No other petitioner is involved in this petition.

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Amendment VI, right to counsel in a criminal case, Amendments V and XIV, Petitioner's right to the equal protection of the law and the right to due process.

STATEMENT OF THE CASE

On September 9, 2003, Petitioner was convicted of the charges of felony DUI and wreckless driving in the Circuit Court of Baldwin County, AL. On November 20, 2003,

Petitioner was sentenced to eight years imprisonment on the felony DUI conviction, fined $5,500.00, ordered to pay $100.00 VCA, and pay Court costs. On the wreckless driving conviction, he was sentenced to six months confinement to run concurrent with his felony DUI sentence, and fined $500.00. On November 20, 2003, Petitioner appealed his convictions and sentences to the Alabama Court of Criminal Appeals. The Court of Criminal Appeals affirmed the judgment on October 29, 2004, an application for rehearing was filed on November 12, 2004 and overruled on December 3, 2004. A Petition for Writ of Certiorari to the Supreme Court of Alabama was filed on December 17, 2004, and was denied on March 11, 2005. On June 9, 2005, Petitioner filed this Writ of Certiorari in the U.S. Supreme Court.

STATEMENT OF FACTS

To prove a case of felony DUI against Petitioner, the State offered three of his prior DUI convictions. Prior to the start of trial, Petitioner motioned the Court to dismiss the case

in its entirety due to a lack of subject matter jurisdiction. Counsel for Petitioner, by way of proffer, stated that if Petitioner testified, he would say that he did not have a lawyer representing him on the date when he entered his guilty plea. That Petitioner would say he changed his plea to guilty and the Judge sentenced him to 25 days in jail, which included a 15 day jail sentence and the balance was for the payment of fines. (R. 4-5). Petitioner argued the May 25, 1990 DUI conviction was not a valid conviction for felony DUI purposes in that he was not represented by legal Counsel at the trial, did not waive his right to Counsel, and the fact he received a jail sentence. (R. 4-5). There were two separate copies of the May 25, 1990 DUI conviction. The copy from the Department of Public Safety introduced by the State, does not indicate Petitioner received a jail sentence, nor that he was ordered to pay a fine and Court cost. (R2. 5-6). A certified copy of the May 25, 1990 DUI conviction obtained from the Mobile, Alabama Municipal Court, which was introduced by

the Petitioner, indicates Petitioner received a jail term of 25 days, which included a 15 day jail sentence and the balance for the Court fine. (R2. 7-8). Both reports indicated the disposition date of the sentence was 5-25-90. The Trial Judge, after viewing the conflicting reports, and without receiving any additional evidence, though both reports indicated the only disposition date of the sentence was 5-25-90, concluded the jail term was a post conviction matter which would not trigger the requirement of whether he had an attorney or not at the original adjudication hearing, and accordingly, denied Petitioner's motion. (R. 5-6).

Officer Reginald Ardis of the Daphne, AL Police Department testified that on March 16, 2002, while he was traveling on Highway 98 in Daphne, AL, Petitioner, while driving his truck alongside of him, crossed over into his lane about 12 inches. (R. 42). Officer Ardis stated it was not unusual that sometimes drivers veer a little over into another's lane, then get back into his/her lane. (R. 57). Officer Ardis

stated he followed Petitioner for about a tenth of a mile, and that during that time, Petitioner drifted twice about 6 to 12 inches over the right painted line in the right lane. (R. 42, 58). Officer Ardis stated he did not know whether Petitioner's truck drifted due to being out of alignment. (R. 58). He signaled for Petitioner to pull over and Petitioner immediately pulled over and crossed over a ditch/slope. (R. 55, 58). Officer Ardis stated when Petitioner exited his truck he was talking on a telephone, but he wasn't sure if Petitioner was talking on the telephone when he was driving. (R. 59-60). Officer Ardis stated Petitioner was slightly unsteady on his feet when he walked towards him, but that it was a dark, slopey, grassy area where he exited his truck. (R. 60-61). As Petitioner approached him, Officer Ardis stated Petitioner told him he had had a few beers, he did not say when he had them. (R.79-80). When Petitioner came and stood in front of him, Officer Ardis stated he had not formed an opinion at that time as to whether or not Petitioner was intoxicated. (R. 62).

Officer Ardis stated he told Petitioner that he was going to run some tests, and if Petitioner tested out okay, he'd be free to go. (R. 62). In viewing the video tape of the incident, in watching Petitioner walk towards him from his truck, Officer Ardis stated Petitioner walked straight like a normal person would walk. (R.65). When questioned if he knew how Petitioner regularly talked, Officer Ardis stated he did not, and that he didn't know whether Petitioner normally spoke with a type of slurred speech. (R. 65). Petitioner stood totally straight in front of Officer Ardis throughout the time he was speaking to him. Officer Ardis stated Petitioner moved his head when he asked him to follow the movement of the pen he was waving in front of him, that this was error on his part, and that Defendant didn't properly touch his fingers in the manner he was instructed to do when he was performing a field sobriety test. Officer Ardis stated he did not tell Petitioner he had performed the tests incorrectly, and he did not give him the opportunity to try and perform them again. (R. 69-72).

Officer Ardis stated after the foregoing tests had been performed, he still had not entirely formulated an opinion as to whether Petitioner was intoxicated to the point he could not safely operate a motor vehicle. (R. 72-73). Without conducting further tests, and after an argument between Officer Ardis and Petitioner, Petitioner was arrested for DUI and wreckless driving. Petitioner declined to take any further tests at that point. (R. 49-51). Petitioner was later charged with possession of an open container in his vehicle. (R. 52).

At the conclusion of the Prosecution's case, Petitioner moved for a finding of not guilty on the grounds that the State had failed to prove a prima facie case on any of the charges. The motion was denied. (R. 81-82). At the conclusion of the Petitioner's case, Petitioner again moved for a finding of not guilty for the reasons stated in his motion after the conclusion of the Prosecution's case. The motion was denied. (R. 83-84).

After deliberation, the jury found Petitioner guilty of DUI and wreckless driving, and not guilty of possession of an open container. (R. 112-113).

The Trial Judge convened a hearing for the jury to determine whether Petitioner had three prior qualifying DUI convictions to warrant the felony DUI charge. Petitioner testified that at the arraignment for his July 1, 1989 DUI charge, he was represented by attorney Palughi. At the trial of the said case, Petitioner stated he was not able to retain attorney Palughi to represent him due to the fact he had lost his job. Petitioner stated he pled guilty to the DUI charge without representation from an attorney and without having waived his right to an attorney. (R. 117-120). Petitioner stated he was sentenced to 25 days in jail, which included a 15 day jail sentence and the balance was for the payment of fines. (R. 4-5). At the conclusion of the evidence, inter alia, the Trial Judge instructed the jury:

"...if you find that he did not receive jail time, but that

> the jail time was for fines and costs of what we call "post-judgment time," which is not the actual sentence he received, then you don't have to go any further and you can find that it is a valid conviction." (R. 135).

Petitioner objected to the jury charge, inter alia, stating:

> "...We say that the fact that he was sentenced to jail and had a jail sentence because of the DUI, that that is what controls, not if there were court costs and fines, but the fact that he went to jail. And so he got a jail sentence so that triggered it is what we are saying." (R.137).

The Trial Judge noted Petitioner's objection but did not change the jury instruction. (R. 137). The jury reached a verdict that Petitioner had at least three prior DUI convictions. (R2. 139). Petitioner was sentenced to eight years imprisonment on the felony DUI conviction, fined $5,500.00, ordered to pay $100.00 VCA, and pay Court costs. On the wreckless driving conviction, he was sentenced to six months confinement to run concurrent with his felony DUI sentence, and fined $500.00. (R. 4-9). On November 20, 2003, Appellant appealed his convictions and sentences.

REASONS FOR GRANTING THE WRIT

I. WHETHER THE TRIAL JUDGE COMMITTED REVERSIBLE ERROR IN DENYING PETITIONER'S MOTION TO DISMISSS FOR A LACK OF SUBJECT MATTER JURISDICTION IN THAT THE STATE FAILED TO PROVE DEFENDANT WAS REPRESENTED BY COUNSEL OR WAIVED HIS CONSTITUTIONAL RIGHT TO COUNSEL AS TO THREE PRIOR DUI CONVICTIONS THAT WERE REQUIRED FOR A FELONY DUI PROSECUTION?

The Sixth Amendment of the Constitution gives a defendant the right to have counsel in a criminal case. Further, the Fifth and Fourteenth Amendments guarantee every citizen the right not to be deprived of his liberty without due process of law.

If the State intends to use a prior DUI conviction for enhancement purposes, and the Defendant received a jail term for the prior DUI, the State must establish that the accused was represented by counsel at the prior DUI proceeding or that the Defendant waived the right to counsel. State v. Thrasher, 783

So.2d 107 (Ala.Crim.App. 2000).

The State offered into evidence a May 25, 1990 DUI conviction of the Petitioner. The record copy of the DUI listed the name of Delano Palughi as Petitioner's attorney. By way of a proffer, and later by the testimony of Petitioner, it was established that at his arraignment for his July 1, 1989 DUI charge, he was represented by attorney Palughi. However, at his May 25, 1990 trial of the said case, Petitioner stated he was not able to retain attorney Palughi to represent him due to the fact he had lost his job. Petitioner testified he was not represented by counsel, and he did not waive his right to counsel when he was tried and convicted of DUI on May 25, 1990. Further, Petitioner stated he changed his plea to guilty and the Judge sentenced him to 25 days in jail, which included a 15 day jail sentence and the balance was for the payment of fines. Other than offering into evidence a copy of Petitoner's May 25, 1990 DUI conviction, the State offered no evidence to refute Petitioner's assertion that he was not

represented by counsel, and did not waive his right to counsel at his May 25, 1990 DUI trial.

There were two separate copies of the May 25, 1990 DUI conviction. The copy from the Department of Public Safety introduced by the State, does not indicate Defendant received a jail sentence, nor that he was ordered to pay a fine and Court cost. (R2. 5-6). A certified copy of the May 25, 1990 DUI conviction obtained from the Mobile, Alabama Municipal Court, which was introduced by the Petitioner, indicates Petitioner received a jail term of 25 days, which included a 15 day jail sentence and the balance for the Court fine. (R2. 7-8). Both reports indicated the disposition date of the sentence was 5-25-90. The Trial Judge, after viewing the conflicting reports, and without receiving any additional evidence, though both reports indicated the only disposition date of the sentence was 5-25-90, concluded the jail term was for the payment of a fine and court cost, a post conviction matter which would not trigger the requirement of whether he

had an attorney or not at the original adjudication hearing, and accordingly, denied Petitioner's motion to dismiss the case for lack of subject matter jurisdiction. (R. 5-6). Though the Trial Judge concluded the Department of Public Safety's copy of the May 25, 1990 DUI conviction indicated accurately what occurred at the trial, the said report does not indicate in any way that the Court assessed a fine and court cost against Defendant. Accordingly, the Trial Judge had no basis to conclude that the imposed jail sentence was for the payment of a fine and court cost. State v. Thrasher, supra, and its progeny of cases, makes no distinction as to whether a defendant is sentenced to a jail term for a DUI conviction to satisfy a fine or court cost, or whether it is strictly for a sentence. That which triggers the right to counsel is the imposed jail term.

Petitioner's May 25, 1990 DUI conviction was not a valid conviction for felony DUI purposes in that he was not represented by legal Counsel at the trial, did not waive his right to Counsel, and the fact he received a jail sentence.

Without considering the May 25, 1990 DUI conviction, Petitioner had only two. Accordingly, the case was due to be dismissed for lack of subject matter jurisdiction.

Rule 14.4, Alabama Rules of Criminal Procedure states the Court shall not accept a guilty plea without first ascertaining that the Defendant has a full understanding of what a guilty plea means and its consequences. There must be some type of written document to indicate the Petitioner's rights were explained to him and that he understood them. The 5-25-90 DUI guilty plea conviction contains no written document of any kind that indicates Petitioner's rights were explained to him or that he understood them. For all the foregoing reasons, the 5-25-90 DUI conviction did not qualify as a prior DUI conviction for felony DUI purposes, accordingly, the Trial Court lacked jurisdiction over the case.

Assuming arguendo the Trial Court had jurisdiction over the case even though the 5-25-04 DUI failed to qualify as a conviction for felony DUI purposes, the maximum sentence

the Trial Court could have imposed for a misdemeanor DUI is one (1) year. Code of Alabama Section 32-5A-191. Considering the foregoing, the Trial Court committed reversible error in sentencing Petitioner to eight (8) years imprisonment.

II. WHETHER THE TRIAL JUDGE COMMITTED REVERSIBLE ERROR IN IMPROPERLY INSTRUCTING THE JURY AS TO WHAT QUALIFIED AS A PRIOR QUALIFYING DUI CONVICTION FOR FELONY PROSECUTION PURPOSES?

In spite of the fact the May 25, 1990 D.U.I conviction indicated Petitioner only had one hearing for his sentencing, and that he was sentenced to a jail term at that proceeding, the Trial Judge still concluded Petitioner's jail term was imposed at some later proceeding, and that the jail term was imposed for Petitioner's court cost and fines, and not for a sentence. The Trial Judge instructed the jury that if the jury concluded Petitioner's jail term was for the payment of fines and court cost, and not for his sentence, then it didn't have to go any

further and it could find that it was a valid conviction. State v. Thrasher, supra, and its progeny of cases, make no distinction as to whether a defendant is sentenced to a jail term for a DUI conviction to satisfy a fine or court cost, or whether it is strictly for a sentence. That which triggers the right to counsel is the imposed jail term. The Trial Judge's jury instruction was an inaccurate statement of the law and of the facts, and Petitioner was substantially prejudiced by it.

III. WHETHER THERE WAS INSUFFICIENT EVIDENCE TO SUPPORT THE GUILTY VERDICTS?

Petitioner only veered less than a foot out of his lane. When he pulled over to the side of the road at a place where there was a ditch, he did so at the officer's instruction. The evidence was insufficient to establish beyond a reasonable doubt that Petitioner drove wrecklessly. Petitioner did not stagger when he walked, he stood completely straight throughout the time Officer Ardis questioned him, and he performed the field sobriety tests Officer Ardis requested of

him, though not to Officer Ardis' subjective satisfaction. The evidence was insufficient to establish beyond a reasonable doubt that Petitiner was guilty of DUI.

CONCLUSION

For all the foregoing reasons, and those related thereto, Petitioner's convictions and sentences are due to be set aside. Assuming arguendo the Trial Court had jurisdiction over the case even though the 5-25-04 DUI failed to qualify as a conviction for felony DUI purposes, and there was sufficient evidence to support Petitionert's convictions, the maximum sentence the Trial Court could have imposed for a misdemeanor DUI is one (1) year, accordingly, the case would be due to be remanded to the Trial Court for Petitioner to be sentenced for the misdemeanor dui conviction.

Respectfully submitted,

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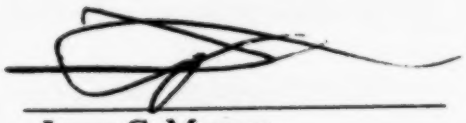
Mobile, AL 36602
(251) 432-0002

Certificate of Service

I hereby certify that I have on this 9th day of June, 2005, served a copy of the foregoing Brief for Writ of Certiorari upon the Alabama Attorney General's Office, Alabama State House, Criminal Appeals Division, 11 South Union St., Montgomery, AL 36130, by U.S. Mail, postage prepaid.



Larry C. Moorer

IN THE SUPREME COURT OF ALABAMA

March 11, 2005

1040406

Ex parte Carl A. Pryear. PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS (In re: Carl A. Pryear v. State of Alabama) (Baldwin Circuit Court: CC02-1349; Criminal Appeals : CR-03-0560).

CERTIFICATE OF JUDGMENT

Writ Denied

The above cause having been duly submitted, IT IS CONSIDERED AND ORDERED that the petition for writ of certiorari is denied.

COST TAXED TO PETITIONER.

SEE, J. - Nabers, C.J., and Harwood, Stuart, and Bolin, JJ., concur.

I Robert G. Esdale, Sr., as Clerk of the Supreme Court of Alabama, do hereby certify that the foregoing is a full, true and correct copy of the instrument(s) herewith set out as same appear(s) of record in said Court.

Witness my hand this 11th day of March, 2005

Robert G. Esdale, Sr.
Clerk, Supreme Court of Alabama

Appendix "A"

COURT OF CRIMINAL APPEALS
STATE OF ALABAMA

Lane W. Mann
Clerk
Sonja McKnight
Assistant Clerk

P. O. Box 301555
Montgomery, AL 36130-1555
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December 3, 2004

CR-03-0560

Carl A. Pryear v. State of Alabama (Appeal from Baldwin Circuit Court: CC02-1349)

NOTICE

You are hereby notified that on December 3, 2004 the following action was taken in the above referenced cause by the Court of Criminal Appeals:

Application for Rehearing Overruled.

Lane W. Mann, Clerk
Court of Criminal Appeals

cc: Hon. Jody Campbell, Circuit Clerk
Larry C. Moorer, Attorney
Hon. Corey L. Maze, Asst. Attorney General

Appendix "B"

BEST AVAILABLE COPY

Notice: This unpublished memorandum should not be cited as precedent. See Rule 54, Ala.R.App.P. Rule 54(d), states, in part, that this memorandum "shall have no precedential value and shall not be cited in arguments or briefs and shall not be used by any court within this state, except for the purpose of establishing the application of the doctrine of law of the case, res judicata, collateral estoppel, double jeopardy, or procedural bar."

Court of Criminal Appeals

State of Alabama
Judicial Building, 300 Dexter Avenue
P. O. Box 301555
Montgomery, AL 36130-1555

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OCT 29 2004
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ALA COURT CRIMINAL APPEALS

H.W."BUCKY" McMILLAN
Presiding Judge
SUE BELL COBB
PAMELA W. BASCHAB
GREG SHAW
A. KELLI WISE
Judges

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MEMORANDUM

CR-03-0560 Baldwin Circuit Court CC-02-1349

Carl A. Pryear v. State

McMILLAN, Presiding Judge.

The appellant, Carl A. Pryear, was found guilty of felony driving under the influence ("DUI"), a violation of § 32-5A-191(a) and (h), Ala. Code 1975. He also was found guilty of reckless driving, a violation of § 32-5A-190, Ala. Code 1975. The trial court sentenced Pryear to 8 years' imprisonment on the DUI conviction and ordered him to complete drug and alcohol treatment in prison, surrender his driver's license, and pay a $3,500.00 fine, a $100.00 crime victims' assessment, and court costs. The court ordered him to serve a concurrent term of 6 months' confinement on the reckless driving conviction and pay a $500.00 fine.

Appendix "C"

The State's evidence tended to show that on March 16, 2 002, Daphne police officer Reginald Ardis was on patrol northbound in the left lane of Highway 98. The appellant's blue truck was traveling in the right lane. As Ardis passed by Pryear, the appellant crossed the dividing line and entered a distance of at least twelve inches into the adjoining lane. Ardis braked to avoid being sideswiped and pulled in behind Pryear's truck. When he saw Pryear drift to the right across the "fog line" twice in a distance of approximately one-tenth of a mile, Ardis activated his blue lights. Pryear made a ninety-degree turn, crossed a ditch, and stopped on the lawn of a store. He then walked toward Ardis with a slightly unsteady gait and stated: "I'm not gonna lie to you. I've had a few beers. I'm just trying to get home." The appellant's eyes were bloodshot and glassy, his speech was slurred, and there was a strong odor of an alcoholic beverage on his breath. Ardis then asked him to perform several field sobriety tests. The appellant did not perform the first two tests as Ardis instructed, and he said that he could not perform the third and fourth tests because he did not know the alphabet and he had back problems. Ardis, asked him to do a finger-to-nose test, but the appellant acted as if he did not understand the instructions and stated: "Go ahead and take me to jail." Ardis placed him under arrest for DUI and reckless driving and conducted a search of his truck. In the center console, Ardis found a clear plastic cup containing a liquid that smelled like beer. He took the appellant to the police station and issued a citation for the open container he had found in the truck.[1] The appellant subsequently refused to provide a breath sample for a Drager breathalyzer test. The stop was recorded by the video camera in Ardis's patrol car, and the jury viewed the videotape.

After the jury delivered its guilt-phase verdict, the trial court conducted a penalty-phase hearing in order for them to determine whether Pryear had three valid prior DUI convictions. The appellant admitted that he had two such convictions, but he challenged a third conviction that he had received on May 25, 1990. Pryear testified that attorney

---

[1]The jury found Pryear not guilty of unlawful possession of an open container of alcohol in a motor vehicle. See § 32-5A-330, Ala. Code 1975.

Delano Palughi[2] had represented him at arraignment on that offense. He said that he had no counsel when he pleaded guilty because he could not afford to pay Palughi after losing his job. Pryear testified that he had been sentenced to serve a total of 25 days in jail, 15 days for the conviction and the balance for failing to pay his fines. After the hearing, the jury found that Pryear had at least three valid prior DUI convictions. The trial court then sentenced him for felony DUI.

I

The appellant contends that the trial court erred in denying his motion to dismiss for lack of subject matter jurisdiction because, he says, the State failed to prove that he had three prior qualifying DUI convictions. He argues that his May 25, 1990, conviction was not valid for felony DUI purposes because he was not represented by counsel at trial, he did not waive his right to counsel, and he received a jail sentence.

The State and the appellant submitted certified copies of the uniform traffic citation and the municipal court's disposition sheet for the May 25, 1990, conviction.[3] The State's exhibit was obtained from the Alabama Department of Public Safety, and the appellant's from the Mobile Municipal Court. Both are copies of the same documents, but Pryear's copies are more legible. They also contain several notations that do not appear on the exhibit submitted by the State.

Both exhibits reflect that "Delano Palughi" was the "Attorney for Defendant" and that counsel was not waived. Neither exhibit contains any evidence that Palughi appeared only at arraignment, as the appellant claimed. The trial court therefore properly found that "there's nothing on the record to indicate that [Palughi] represented [Pryear] for arraignment only."

---

[2]Palughi was deceased at the time of Pryear' s trial on the current charges.

[3]These documents were admitted as State's Exhibit C and Defendant's Exhibit 1.

Both exhibits reflect that the municipal court did not impose a fine or court costs in the May 25, 1990, conviction.[4] The State's exhibit indicates that no jail time was imposed, while the appellant's indicates a 15-day sentence.[5] The appellant's exhibit also contains an additional handwritten notation: "To serve 25 days for fine and Time."

The appellant argues that his exhibit proves that he received a 15-day jail sentence for his DUI conviction and an additional 10-day sentence to satisfy his fine. However, the trial court found that any jail time Pryear was ordered to serve was a post-conviction matter. The court explained that the notations apparently had been made after his conviction because they were not on the copy submitted by the State.

The trial court's finding is supported by the record. Pryear's claim regarding the 10-day sentence was refuted by both exhibits, which affirmatively reflected that "zero" fine had been imposed. Pryear's claim regarding the 15-day sentence was refuted by an additional handwritten notation, "10/19/91," which appeared near the top of his exhibit. A certified copy of Pryear's October 3, 1991, offense revealed that he had pleaded guilty on "10/11/91" In Mobile Municipal Court. The court imposed a fine of $250 and court costs of $37 and "Waive[d] DUI School [Illegible] Jail" in that case. Thus, it appears that the notations *on* Pryear's May 25, 1990, conviction should have been entered on his October 11, 1991, case.

Furthermore, even if the State had failed to prove that all of Pryear's prior DUI convictions were valid, the trial court would not have lost jurisdiction of the felony offense.

In Pruitt v. State, [Ms. 1030328, May 7, 2,004] So. 2d (Ala. 2004), the Alabama Supreme Court explained that subsection (h) of § 32-5A-191 merely prescribes punishment for someone convicted under subsection (a) and failing to refer to subsection (h) in the indictment does not, deprive the trial

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[4]"Both exhibits contain a typewritten zero ["-0-"] in the space marked "Fine" and the space marked "Court Costs."

[5]The State's exhibit contains a blank ["Jailed Days"]. The appellant's contains a handwritten number ["Jailed 15 Days"].

court of jurisdiction to impose the felony sentence. Here, similarly, the State's failure to prove one of the three underlying convictions would not have deprived the trial court of jurisdiction, although it would have entitled Pryear to a misdemeanor sentence under subsection (g) of § 32-5A-191. See § 12-11-30, Ala. Code 1975 (providing that the circuit court has exclusive original jurisdiction of misdemeanor violations which are lesser included offenses within a felony charge or which arise from the same incident as a felony charge).

II.

Pryear contends that the trial court erred in instructing the jury as to what qualified as a prior DUI conviction for felony prosecution purposes. He argues that the court should not have instructed the jury that if they concluded that his jail term was for the payment of fines and court costs and not for his sentence, they did not have to go any further and could find that the conviction was valid. He argues that State v. Thrasher, 783 So. 2d 107 (Ala. Crim. App. 2000), "makes no distinction as to whether a defendant is sentenced to a jail term for a DUI conviction to satisfy a fine or court cost, or whether it is strictly for a sentence." He further argues: "That which triggers the right .to counsel is the imposed jail term."

The trial court instructed the jury, in pertinent part:

> "... [W]hat you need to consider is, One, did he receive jail time because if the Defendant did not receive jail time on that one case in issue, then it does not matter whether he had legal cpunsel or not.
>
> "The second thing you need to consider is ... if you find that he did not receive jail time, but that the jail time was for fines and costs of. what we call "post-judgment time,' which is not the actual sentence he received, then you don't have to go any further and you can find that it is a valid conviction.
>
> "If, however, you find that he did receive jail time, then ... the law of Alabama is that before a

prior conviction can be used against a defendant in sentencing, it must be determined that ... he had legal counsel to represent him in that case.

"After you go back there, if you make a determination that, yes, he did receive jail time, but, *no,* he did not have legal counsel, then you should find that it is not a valid conviction.

"If, however, after your deliberations, each of you are convinced ... beyond a reasonable doubt that ... although he was sentenced to jail time, he did have legal counsel, then you can find that it is a valid prior conviction."

In Thrasher, the Alabama Supreme Court stated:

"The State, in order to use a prior DUI misdemeanor conviction to enhance a defendant's DUI sentence, need not prove that in. the earlier proceeding the defendant was represented by counsel or knowingly and voluntarily waived counsel, if in the prior proceeding the defendant did not receive a jail term."

783 So. 2d at 106. (Emphasis added.) The Court noted that the circuit court had found two of Thrasher's four prior DUI convictions were "uncounseled," "meaning that the record did not show that Thrasher had been represented by counsel, or that he had voluntarily waived his right to counsel. " 783 So. 2d at 105. (Emphasis added.)

Here, Pryear' s evidence that he was sentenced to jail time was refuted by an essentially identical document that was offered by the State. "In misdemeanor cases . . . the right [to counsel] applies only when the defendant is actually sentenced to jail." Ex parte Reese, 620 So. 2d 579, 580 (Ala. 1993). Furthermore, Pryear's challenged conviction was not "uncounseled" because the record affirmatively reflected that he had been represented *by* attorney Delano Palughi. Pryear testified that the record was erroneous, but he did not offer any evidence other than his own testimony. This court will not overturn a jury verdict on conflicting evidence. Dixon v. State, 476 So. 2d 1236 (Ala. Crim. App. 1985). No judgment

may be reversed on the ground of misdirection of the jury unless in the opinion of the appellate court, the alleged error has probably injuriously affected the parties' substantial rights. Rule 45, Ala. R. App." P.

III.

Pryear's third contention is that the evidence was insufficient to support the guilty verdicts. He argues that he should not have been convicted of reckless driving because he veered less than a foot out of his lane and he pulled over by the ditch at Officer Ardis's instruction. He argues that he should not have been convicted of DUI because he did not stagger when he walked, he stood straight during Ardis's questioning, and he performed the field sobriety tests, although not to the officer's satisfaction.

The appellant's arguments cannot be considered because he has waived them on appeal. Rule 28(a) (10), Ala. R. App. P., requires the argument portion of an appellant's brief to contain "the contentions of the appellant with respect to the issues presented, and the reasons therefore with citations to the cases, statutes, other authorities, ' and parts of the record relied on." Pryear has not cited any case, statute, or other authority, and he has not indicated any part of the record on which he has relied. "Recitation of allegations without citation to any legal authority and without adequate recitation of the facts relied upon has been deemed a waiver of the arguments listed." Hamm v. State^ [Ms. CR-99-0654, February 1, 2002] So. 2d , (Ala. Crim. App. 2002).

AFFIRMED.

Wise, J., concurs. Cobb, Baschab, and Shaw,. JJ., concur in the result.